

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOHN CHARLES SPURLOCK,
Petitioner,
VS.
RICK THALER,
Director, T.D.C.J.
Correctional Institutions Div.,
Respondent.

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§ CIVIL ACTION NO. 4:10-CV-398-Y
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ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND CONCLUSIONS
AND ORDER DENYING CERTIFICATE OF APPEALABILITY

In this action brought by petitioner John Charles Spurlock under 28 U.S.C. § 2254, the Court has made an independent review of the following matters in the above-styled and numbered cause:

1. The pleadings and record;
2. The proposed findings, conclusions, and recommendation of the United States magistrate judge filed on June 9, 2010; and
3. The petitioner's written objections to the proposed findings, conclusions, and recommendation of the United States magistrate judge filed on June 21, 2010.

The Court, after **de novo** review, concludes that Petitioner's objections must be overruled, and that the petition for writ of habeas corpus should be dismissed for the reasons stated in the magistrate judge's findings and conclusions. Although this Court, in its discretion, may transfer successive petitions under 28 U.S.C. § 2254 to the United States court of Appeals for the Fifth Circuit, because Spurlock has previously filed a successive petition, the Court concludes this case must be dismissed.¹

¹See *Nino v. United States*, No. 3:09-CV-0423-G (3:93-CR-359-G), 2009 WL 721728, at *4 (N.D.Tex. March 18, 2009) ("In this instance, a dismissal without prejudice appears most appropriate because movant has already been informed that he must seek leave from the Fifth Circuit to file a second or successive motion to vacate and the Fifth Circuit has previously denied him authorization to file a successive motion"); see also *Patterson v. Miller*, No. 3:04-CV-0628-K, 2004 WL 743697, at *2 (N.D.Tex. April 2, 2004) (when petitioner files successive petition in district court without complying with 28 U.S.C. § 2244(b)(3), the court may

Therefore, the findings, conclusions, and recommendation of the magistrate judge are ADOPTED.

Petitioner John Charles Spurlock's petition for writ of habeas corpus is DISMISSED WITHOUT PREJUDICE to his right to file a motion in the United States Court of Appeals for the Fifth Circuit for leave to file a successive petition.

Certificate of Appealability

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253.² Rule 11 of the Rules Governing Section 2254 Proceedings now requires that the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."³ The COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."⁴ A petitioner satisfies this standard by showing "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further."⁵

Upon review and consideration of the record in the above-

in its discretion, transfer or dismiss the case)(citing *In re Epps*, 127 F.3d 364, 365 (5th Cir. 1997)), recommendation adopt'd, 2004 WL 941897 (N.D.Tex. April 21, 2004).

²See FED. R. APP. P. 22(b).

³RULES GOVERNING SECTION 2254 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS, RULE 11(a) (December 1, 2009).

⁴28 U.S.C.A. § 2253(c)(2)(West 2006).

⁵*Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003), citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

referenced case as to whether petitioner Spurlock has made a showing that reasonable jurists would question this Court's rulings, the Court determines he has not and that a certificate of appealability should not issue for the reasons stated in the June 9, 2010, Findings, Conclusions, and Recommendation of the United States Magistrate Judge, and for the reasons stated herein.⁶

Therefore, a certificate of appealability should not issue.

SIGNED June 24, 2010.



TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

⁶See FED. R. APP. P. 22(b); see also 28 U.S.C.A. § 2253(c)(2)(West 2006).